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No. 98-433

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

W. A. MERKLE, Warden, *Petitioner*,

v.

CLYDE EDWIN SEIDEL, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a state inmate receive a federal evidentiary hearing on a claim of ineffective assistance of counsel and present evidence never alleged as the basis for the claim in the state court, where the state afforded the inmate a full and fair hearing on his federal claim?

2. Does a ruling by the Ninth Circuit Court of Appeals circumvent the holding of *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), relieving the state inmate from his burden to demonstrate cause and prejudice from his failure to develop a material fact in the state court proceedings?

TABLE OF CONTENTS

	Page
CERTIORARI IS NECESSARY TO RESTORE THE VIABILITY OF THIS COURT'S EXHAUSTION DOCTRINE	1
CONCLUSION	3

TABLE OF AUTHORITIES

	Page
Cases	
Clemmons v. Delo 124 F.3d 944 (8th Cir. 1997)	1
Keeney v. Tamayo-Reyes 504 U.S. 1 (1992)	1, 2
Mathis v. Zant 975 F.2d 1493 (11th Cir. 1992)	1
Mitchell v. Rees 114 F.3d 571 (6th Cir. 1997) *cert. denied*, 118 S. Ct. 1062 (1998)	1
Pagan v. Keane 984 F.2d 61 (2d Cir. 1993)	1
Seidel v. Merkle 146 F.3d 750 (9th Cir. 1998)	1
Townsend v. Sain 372 U.S. 293 (1963)	2
Weeks v. Bowersox 119 F.3d 1342 (8th Cir. 1997)	2
Statutes	
28 U.S.C. § 2254	2

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998
No. 98-433

W. A. MERKLE, Warden, *Petitioner*,

v.

CLYDE EDWIN SEIDEL, *Respondent*.

CERTIORARI IS NECESSARY TO RESTORE THE VIABILITY OF THIS COURT'S EXHAUSTION DOCTRINE

Respondent Clyde Edwin Seidel (Seidel) contends that certiorari should be denied because there is no division of authority within the circuits. The Ninth Circuit Court of Appeals adeptly recognized the contrary. *See Seidel v. Merkle*, 146 F.3d 750, 754 (9th Cir. 1998); *see also Mitchell v. Rees*, 114 F.3d 571, 577 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1062 (1998); *Clemmons v. Delo*, 124 F.3d 944, 951-52 (8th Cir. 1997); *Pagan v. Keane*, 984 F.2d 61, 63-65 (2d Cir. 1993); *Mathis v. Zant*, 975 F.2d 1493, 196-97 (11th Cir. 1992). Contrary to Seidel's argument, certiorari is necessary to settle the division of authority within the circuits.

Seidel fails to respond to the State's assertion that the Ninth Circuit Court of Appeals decision emasculates *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). By relieving Seidel of his obligation to demonstrate cause and prejudice for his failure to perfect his federal claim in state court, where the state afforded Seidel every opportunity to perfect that claim, the Ninth Circuit Court

of Appeals defeats *Tamayo-Reyes* and its stated concerns of finality, comity, judicial economy, exhaustion, and uniformity in governing habeas corpus principles. *See Tamayo-Reyes*, 504 U.S. at 8-10.

Here, the district court invited Seidel to marshall new facts to fortify his federal claim. Following an evidentiary hearing and with his federal claim now fortified with new facts, Seidel prevailed in the federal courts. The procedure the district court employed effectively denied the state courts the opportunity to pass on those new facts, violating the doctrine of exhaustion. Under the guise of an exercise of discretion, a district court may now relieve a state inmate from the requirement of showing cause for and prejudice from the inmate's failure to develop the material facts in the state courts before bestowing the privilege of an evidentiary hearing. Where, as here, the inmate was given every opportunity to perfect his claim before invoking the jurisdiction of the federal district court, we ask rhetorically what remains of *Keeney v. Tamayo-Reyes*?

Alternatively, if the Ninth Circuit panel decision is correct and *Tamayo-Reyes* is so limited, then the State respectfully argues that it is time that this Court revisit *Townsend v. Sain*, 372 U.S. 293 (1963), and overrule it as contrary to the habeas corpus doctrines developed in recent years.

Finally, we note that in the recent amendment of 28 U.S.C. § 2254 effected by the Antiterrorism and Effective Death Penalty Act of 1996, Congress arguably codified and narrowed this Court's *Keeney v. Tamayo-Reyes* standard. *See Weeks v. Bowersox*, 119 F.3d 1342, 1354 n. 12 (8th Cir. 1997). Thus, any misinterpretation of this Court's *Tamayo-Reyes* decision has lingering implications. The State's request that this Court grant the petition and restore the mandate of *Tamayo-Reyes* does not merely affect a handful of cases.

CONCLUSION

Accordingly, for the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit in the case at bar.

Dated: December 15, 1998.

Respectfully submitted,

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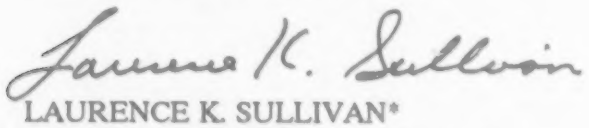

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